

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER FOSTER,)	
)	
Movant,)	
)	
v.)	No. 4:98 CV 1186 DJS
)	DDN
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court upon the amended motion of Christopher Foster to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. This motion has been referred to the undersigned United States Magistrate Judge for review and a recommended disposition pursuant to 28 U.S.C. § 636(b).

On September 22, 1995, movant Christopher Foster was convicted in this court of conspiracy to distribute and possession with the intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On December 8, 1995, movant was sentenced to 300 months imprisonment followed by a five-year term of supervised release. Movant appealed and the United States Court of Appeals for the Eighth Circuit affirmed his conviction and sentence. United States v. Payne, 119 F.3d 637 (8th Cir.), cert. denied, 522 U.S. 987 (1997). On appeal, movant raised six claims: (1) the trial court erred in denying his motion to suppress evidence seized without a warrant; (2) there was no probable cause for movant's warrantless arrest or for the seizure of his bag; (3) movant did not voluntarily consent to the search of his residences; (4) the trial court should not have admitted into evidence the testimony of a government-paid informant; (5) the trial court erred in limiting the time allowed for closing argument; and (6) the trial court erred in finding movant responsible for the distribution of more than twenty kilograms of cocaine. Id. at 639-40.

The facts were summarized by the Eighth Circuit:

Foster first came under investigation when he met with Carlos Garavito, a government-paid informant, on December 9, 1993 to discuss money laundering. Law enforcement agents conducted surveillance of the meeting, and continued doing so after the meeting. Foster never gave Garavito any money to launder.

On December 15, 1993, law enforcement agents followed Foster from his home to a hotel near the Los Angeles airport where he picked up a man later identified as David Woods. Foster and Woods drove to a car repair shop, which Foster entered. After Foster left the shop, Woods and Foster got into a second car and sat in it for a short time. Foster then got out of the car and Woods drove away in it. Law enforcement agents stopped Woods and he consented to a search of the car, which was registered to Nicole Tait. The search of Woods's car revealed an empty secret compartment in the trunk. A narcotic trained dog positively alerted to the secret compartment in the trunk, indicating the compartment had a narcotic odor.

On January 11, 1994, law enforcement agents saw Foster place a box out with the trash for curbside collection. After Foster left, a law enforcement agent removed the box and took it to the Azusa Police Department where a trained police dog indicated the box had a narcotic odor at its bottom.

On February 15, 1994 law enforcement agents followed Foster to a condominium complex. An agent testified before the magistrate that Foster engaged in counter-surveillance driving on his way to the condominium complex. Upon arriving at the complex, Foster took an empty green soft-sided suitcase from the trunk of his car and carried it into the complex. Foster left the building a short time later without the green suitcase and drove to a nearby restaurant where a man later identified as Thomas Payne met him. Foster left his car at the restaurant and drove back to the complex with Payne in Payne's red Thunderbird.

Upon arrival at the complex, Foster got out of the car and walked to a nearby gate. Another man came to the gate and handed Foster a green soft-sided suitcase. The suitcase now appeared to be heavy based upon the manner in which the men carried the suitcase. Foster walked back to the trunk of the car where Payne met him. Payne took the suitcase from Foster and placed it in the trunk. Payne then departed in the Thunderbird, while Foster remained at the complex.

Law enforcement agents followed Payne onto the freeway and eventually stopped Payne's car. Officers searched the car and seized the green suitcase, which contained approximately twenty kilograms of cocaine. After arresting Payne law enforcement agents searched his hotel room, but no evidence seized from the hotel room was introduced at trial.

After Payne's arrest, agents continued surveillance on Foster. On February 17, 1994, two days after Payne's arrest, agents saw Foster leave his residence with a duffle bag that he placed in the trunk of his car. Agents followed him for a short time, then stopped him and asked for permission to search his car. Before the actual search, Foster told agents that the money in his trunk was his, and not money from narcotic transactions. A search indicated that the duffle bag contained \$360,180. Agents then took Foster to the Santa Monica Police Station, where he signed consent forms for the search of his car and his residences. The agents found \$19,333, a money counter, and certain documents during the search of Foster's residence on Ocean Avenue.

Several others were also involved in the conspiracy. Raymond Tohill served as a courier under Payne's direction. Payne also directed Marvin Bonds in some aspects of this conspiracy. Leroy Eason testified at trial that he loaned Payne \$40,000, and that he made four trips to Los Angeles during which he obtained a total of forty-six kilograms of cocaine.

Id. at 640-41.

Grounds for Relief

From movant's amended motion to vacate, filed January 11, 2001, the undersigned discerns nine grounds for relief:

1. The government's seizure of movant's financial and business records and failure to return these documents following a court order pursuant to Fed. R. Crim. Pro. 41(e) violated movant's Fourth, Fifth, and Sixth Amendment rights.
2. The government withheld material evidence which would have established movant's standing to assert a Fourth Amendment claim of illegal search and seizure.

3. There was prosecutorial misconduct by commenting in opening statement about and eliciting testimony regarding the seizure of a money counter and a box containing cocaine residue when this evidence had been lost or destroyed without inspection by the defense.
4. There was prosecutorial misconduct by comments to the jury about movant's involvement in a cocaine conspiracy reaching Colombia and by eliciting testimony regarding \$600,000.00 paid to an informant for information in unrelated investigations involving Colombia, in addition to those comments described in paragraph 3, supra, which deprived movant of due process and the opportunity to present a complete defense.
5. There was prosecutorial misconduct depriving movant of the effective assistance of counsel because the prosecutor represented to defense counsel his theory of the admissibility of certain bad acts under Fed. R. Evid. 404(b) and defense counsel prepared a defense based upon this theory, but then the prosecutor sought and obtained admission of the evidence under Rule 801(d) (2) (E).
6. Movant received ineffective assistance of counsel by counsel's failure to inform him of the significance of the prosecutor's change in strategy described in paragraph 5, supra, or of a plea offer made by the prosecutor immediately prior to trial which movant claims he would have accepted.
7. Movant received ineffective assistance of appellate counsel by counsel's failure to raise on appeal the admissibility of the testimony of Carlos Garavito.
8. Movant received ineffective assistance of appellate counsel in that appellate counsel labored under a conflict of interest because counsel, although appointed under the Criminal Justice Act, demanded payment from movant, thereby demonstrating counsel's interest in financial gain rather than movant's rights.
9. The imposition of 300 months imprisonment was contrary to law because the issue of the quantity of drugs was not submitted to the

jury. Therefore, he could not be sentenced to an enhanced penalty.

Movant has also repeatedly alleged his actual innocence in his pleadings.

Discussion

Relief under 28 U.S.C. § 2255 is reserved for violations of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and which, if uncorrected, would result in a complete miscarriage of justice. United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). A § 2255 motion is not a substitute for a direct appeal. Reid v. United States, 976 F.2d 446, 447 (8th Cir. 1992), cert. denied, 507 U.S. 945 (1993). A § 2255 motion is an improper avenue in which to complain about simple trial errors. Poor Thunder v. United States, 810 F.2d 817, 821 (8th Cir. 1987). Arguments which might warrant reversal on direct appeal will not necessarily support collateral attack. United States v. Frady, 456 U.S. 152, 165 (1982); Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994).¹ It is well settled that claims which were raised and decided on direct appeal cannot be relitigated in a § 2255 motion, unless there has been an intervening change of law or there is newly discovered evidence. Davis v. United States, 417 U.S. 333, 342 (1974); English v. United States, 998 F.2d 609, 612-13 (8th Cir.), cert. denied, 510 U.S. 1001 (1993).

Grounds 1-5: Procedural Bar

Grounds 1, 2, 3, 4, and 5 could have, but were not, raised on direct appeal. "[A] collateral challenge may not do service for an appeal." Frady, 456 U.S. at 165. Movant's failure to raise these issues on direct appeal constitutes a procedural bar to collateral review. Bousley v. United States, 523 U.S. 614, 621-22 (1998)

¹For example, a claim that all of a crime's statutory elements were not proven is not a constitutional claim for habeas purposes. Anderson, 25 F.3d at 706.

(failure to raise issue on appeal constitutes a procedural bar to habeas review). The defaulted claims may only be reviewed on collateral attack if the movant can demonstrate cause excusing the procedural default and actual prejudice resulting from the errors of which he complains. Id. at 622; Reid, 976 F.2d at 448. To establish prejudice, the movant must demonstrate that the errors of which he complained worked to his actual and substantial disadvantage, infecting his trial with error of constitutional dimension. Murray v. Carrier, 477 U.S. 478, 494 (1986).

Alternatively, the claim may be subject to collateral review if movant can show that he is "actually innocent." Bousley, 523 U.S. at 622. To establish "actual innocence" movant must demonstrate that in light of all of the evidence it is more likely than not that no reasonable juror would have convicted him. Id. at 623. "Actual innocence" means factual innocence, not mere legal insufficiency." Id.

A. Actual Innocence

Movant claims "actual innocence" and indeed, if established, this would overcome the procedural bar to review. However, movant fails to establish his "actual innocence." The Supreme Court has reiterated that for a claim of actual innocence to be credible, it "must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559 (1998). Movant faces a two-prong hurdle in establishing "actual innocence." First, he must present new, reliable evidence that was not presented at trial. Such new evidence could be "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." Bannister v. Delo, 100 F.3d 610, 615 (8th Cir. 1996) (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995)), cert. denied, 521 U.S. 1126 (1997). After presenting such new evidence, movant must then establish that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327-28; see also Bousley, 523 U.S. at 623. Determining

whether no reasonable juror would have found movant guilty "turns upon an examination of the whole record to ascertain what inferences are reasonable in light of the evidence presented." Hohn v. United States, 193 F.3d 921, 924 (8th Cir. 1999).

Movant has failed to present this court with any new evidence establishing his actual innocence. Movant argues that, if he can recover his personal papers which he alleges the government is withholding,² he could establish that he was an antiques dealer and therefore had a legitimate purpose in possessing the excessive amount of cash found in the duffle bag. Even assuming that movant could produce documentation establishing that he was an antiques dealer, the undersigned believes that this is not the type of new evidence which would lead this court to reasonably conclude that, on the basis of that evidence, no reasonable jury would have convicted him.

Foster presented evidence at his trial that he was an antiques dealer. He presented the testimony of one of his customers, who had purchased "expensive antiques" from him, and had the cancelled checks from those purchases. Trial Tr., Vol. 7 at 1-5. He presented evidence from those with knowledge of his sale of antiques to others including a cash sale that may have been for as much as \$100,000.00. Id. at 168-74. An antiques appraiser testified regarding the value of some of Foster's antique sales which were valued in excess of \$75,000.00 and \$185,000.00. Id. at 187-94, 199-200. There was additional testimony that only a small portion of the antiques remaining in Foster's possession were valued in excess

²After several court orders directing the government to search for movant's personal papers, it now appears that the documents were mistakenly placed and shipped with another prisoner, one "C. Foster," and were either lost at his destinations or are still with that individual. Government's Amended Status Report, filed July 2, 2001 (Doc. No. 46). Movant made and settled a tort claim against the Bureau of Prisons for the loss of this property. Nevertheless, movant continues to claim that the government is withholding his property and continues to press the court for return of the property.

of \$40,000.00. Id. at 203. There was also testimony that his "nest egg" from antiques totalled "many hundreds of thousands" of dollars and that his antiques represented a "couple of million dollars." Id. at 209-10, 215-18.

Evidence was also presented that cash was the preferred medium of exchange in the antiques business. Further, the jury heard evidence that Foster preferred cash in all of his business ventures. Additional evidence was presented of movant's legitimate business ventures, not limited to the antiques trade, including real estate development and residential construction, in which he routinely dealt with large amounts of cash. Id. at 215-18. Finally, Foster's daughter testified that she was unable to locate a lot of movant's business documents because they were confiscated by police. Id. at 227-28, 231-32; Trial Tr., Vol. 8 at 8. His estranged wife also testified that business documents she could not locate may have been seized by police. Trial Tr., Vol. 8 at 53.

Consequently, the court must conclude that the jury had before it considerable evidence of movant's legitimate antiques and other business dealings to suggest a legitimate reason for possession of a large amount of cash. Defense counsel argued to the jury that Foster's legitimate antiques business accounted for the cash in his possession. Id. at 159-61. Additional documentation would not be "new evidence," but merely cumulative evidence or corroborative evidence. The jury was given an explanation as to why there was not more documentation. The jury considered the evidence and argument and gave it the weight they thought appropriate. It is possible that the jury discounted the evidence or, if credited, did not find it inconsistent with his guilt of the crime charged. It is not likely or reasonably probable that additional evidence of antiques sales or purchases or business licenses or ventures would have resulted in an acquittal.

Aside from arguing that the personal documents allegedly withheld from him would have established his participation in legitimate antiques and other business ventures, movant does not

specifically identify any of these purported documents or argue with any specificity exactly how a reasonable jury would not have convicted him if presented with this additional evidence. Further, the most recent status report from the government concerning this property, filed on July 2, 2001 (Doc. No. 46), contains an inventory of the items involved in movant's tort claim against the Bureau of Prisons. Aside from the documentation discussed above, nothing appears to be "new evidence" and movant has not so argued. Thus, there is no need to hold an evidentiary hearing on this issue, because the undersigned has assumed the facts as alleged by Foster, i.e., the documents would have established his participation in legitimate antiques and other business ventures, yet must conclude that they do not entitle him to relief. Larson v. United States, 905 F.2d 218, 220-21 (8th Cir. 1990) (evidentiary hearing not required if the facts alleged, taken as true, would not justify relief).

Other than his contention that he could present additional documentation of his antiques business, if the government is compelled to produce documents which he contends the government is withholding, Foster fails to identify any other new evidence which would establish his actual innocence. However, movant has asked for a hearing and has filed numerous discovery requests, which he claims will establish his actual innocence of the crimes for which he was convicted. The Eighth Circuit has spoken succinctly on the issue whether evidentiary hearings are required to allow movant to establish actual innocence as follows:

[Movant] also incorrectly asserts that an evidentiary hearing was required so that he could develop evidence in support of his claim of actual innocence. In Battle . . . we rejected the argument that an evidentiary hearing was necessary to enable the petitioner to develop evidence "which, he claim[ed], w[ould] exonerate him." Noting that "[i]n essence, [petitioner] [wa]s asking us to excuse his evidentiary default as to his claim of actual innocence, . . . in order that he may develop sufficient evidence of his actual innocence[,] " we found "[t]his circular argument [wa]s without merit."

Bannister, 100 F.3d at 617 (quoting Battle v. Delo, 64 F.3d 347, 353-54 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996)). Moreover, "the 'actual innocence' gateway through a procedural bar is not intended to provide a petitioner with a new trial, with all the attendant development of evidence, in hopes of a different result." Battle, 64 F.3d at 354 (citing Washington v. Delo, 51 F.3d 756, 761-62 (8th Cir.), cert. denied, 516 U.S. 876 (1995)).

Movant is not entitled to an evidentiary hearing to develop evidence which he claims will demonstrate his actual innocence. Further, movant is not entitled to the requested discovery in the effort to establish his actual innocence. The undersigned has carefully considered his discovery requests in this court's order of July 10, 2000 (Doc. No. 25). Movant sought judicial review of the undersigned's order and the district court affirmed the denial of discovery.³ Many of the discovery requests are not directed at proving Foster's actual innocence, but at attacking trial witnesses' credibility or at discovering other perceived constitutional violations. Movant had an opportunity to and did attack the witnesses' credibility in pretrial proceedings, at trial, and on appeal. See Order, July 10, 2000 (Doc. No. 25). Such was insufficient to persuade the jury of his innocence. The discovery requests constitute no more than fishing expeditions in the hope that such will produce the type of new evidence of actual innocence necessary to surmount the procedural bar.

B. Cause and Prejudice

In addition to failing to establish his actual innocence, movant fails to demonstrate cause and prejudice sufficient to overcome his procedural default. Petitioner does not allege cause for his failure to present grounds 1 through 5 on appeal. The

³The undersigned conditionally granted Foster's motion for return of his property and ordered the respondent to report to the court on the status of movant's property. The district court affirmed this holding. The government has complied. (Doc. Nos. 29, 46).

undersigned recognizes that ineffective assistance of counsel may constitute cause for a procedural default. Apfel, 97 F.3d at 1076. Foster, however, broadly alleges ineffective assistance of appellate counsel due to a conflict of interest allegedly demonstrated by counsel's purported demand for payment although he was appointed under the Criminal Justice Act. See ground 8, supra. These allegations are broad and conclusory. Foster fails to allege with any specificity in what way(s) appellate counsel rendered ineffective assistance. Even assuming counsel asked for payment, that does not establish or suggest under the circumstances of this case that the assistance rendered was ineffective. Id. The court is not required to guess or surmise the manner or means counsel may have been ineffective. See Ford v. United States, 983 F.2d 897, 898-99 (8th Cir. 1993) (movant's summary statement that ineffective assistance of counsel constituted cause for a procedural default was insufficient to establish cause). Further, merely winnowing claims on direct appeal is not ineffective assistance; indeed, that is the job of appellate counsel. Garrett v. United States, 78 F.3d 1296, 1306 (8th Cir.), cert. denied, 519 U.S. 956 (1996) (the selection and winnowing of which issues to bring on appeal is a hallmark of effective advocacy).

Similarly, Foster fails to demonstrate prejudice sufficient to overcome the procedural bar if this court does not consider the merits of the claims he now raises. The undersigned has discussed the substance of ground one in connection with his claim of actual innocence. The undersigned also has considered whether presentation of these business documents at trial would have resulted in a different outcome and concluded that it was unlikely that such would have occurred.

Foster also claims that the documents referred to in ground one contained the names and addresses of persons able to testify to his legitimate business activities. Again, there was substantial evidence of his legitimate business activities presented at trial. Foster does not now specifically identify them or what their

testimony would have been or how it would have varied substantially from the testimony that was presented at trial. Such broad, conclusory statements do not establish prejudice.

In his recent pleading, filed August 6, 2001, Foster identifies a "Mr. Shido" as a witness he was prevented from calling. Claimant's Reply, Etc., (Doc. No. 50) at 13. Again, Mr. Shido would have apparently only testified to antique purchases. Abundant evidence of Foster's legitimate antiques business was presented at trial as set forth above. Foster's daughter testified at trial about the sale of a large antiques collection to an individual named "Shido." Trial Tr., Vol. 8 at 3-6. Foster has not and cannot demonstrate prejudice from the alleged inability to call "Mr. Shido" at trial to support collateral relief.

Similarly, Foster asserts that the government withheld documents "which linked defendant directly to the vehicle driven by David Woods" which if produced would have given movant standing to challenge the search and seizure of Woods's car. With respect to the issue of standing the Eighth Circuit found:

Foster has the burden to show that he had a legitimate expectation of privacy in the car driven by Woods If Foster does not prove a sufficiently close connection to Wood's car . . . then he has no standing to argue that the police searched or seized items illegally.

* * *

Here, Foster did no more than sit in a car outside an auto repair shop in which Woods later drove away. Foster does not assert ownership of the car. Indeed, the car was registered to Nicole Tait. Further, Foster presented no evidence that indicated he had ever possessed the car or had driven it. That Foster sat in the car with Woods for a short time before Woods drove it away, does not convince us that the district court was clearly erroneous in its factual determination that Foster had not established possession or control of the car.

Foster, 119 F.3d at 641-42. The magistrate judge, whose findings were adopted by the district court, determined:

In the present case there is no evidence that establishes that defendant Foster had a legitimate expectation of privacy in the brown Cadillac driven by Woods. He merely picked Woods up at a hotel and drove him to Kike's Auto Repair. Defendant Foster went inside, they picked up the car, and Woods drove away. There is nothing to establish defendant Foster's ownership, possession or control of the car; there is no evidence that he ever used the car before. He remained while Woods drove away thus relinquishing any ability to regulate access. The totality of the circumstances indicates that even if defendant Foster now asserts some subjective expectation of privacy in the car, society is not objectively prepared to recognize that expectation as reasonable. . . .

* * *

There is simply nothing to tie defendant Foster to the brown Cadillac sufficient to amount to a reasonable expectation of privacy.

Order and Report and Recommendation, filed Aug. 11, 1995 (Doc. No. 74) at 33-34.⁴

Again, Foster does not describe how these documents would or could have established his standing. The inventory of items involved in his tort claim against the Bureau of Prisons does not suggest the existence of documents that may demonstrate a link between him and the brown Cadillac.

The pertinent issues, however, in evaluating prejudice are not whether Foster had standing, but assuming that he had standing, would he have been successful in challenging the search of the car driven by Woods and would that success impact the result of the trial. Again, Foster makes no showing in this respect. After hearing the evidence, the magistrate judge determined that Woods, the sole occupant and driver of the car, consented to the search. Id. at 23. There is support for this finding in the record. (Evid.

⁴Foster only objected to the magistrate's findings because she did not purportedly consider the fact that Foster retrieved the keys at the auto repair shop and retrieved the car, apparently then turning it over to Woods who alone drove away in it. Doc. No. 83 at 2.

Hrg. Tr., Vol 1 at 64; see also Claimant's Reply, Etc. (Doc. No. 50, Exh. M at 3). Consequently, even if Foster had standing to challenge the search, it is unlikely that any evidence obtained therefrom would have been excluded. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (search may be undertaken with consent of individual without a warrant or probable cause and any evidence discovered may be seized and admitted at trial); Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (search may be valid when based on the consent of a party whom police reasonably believe to have authority to consent to search even if it is later determined that the party did not have authority). Foster argued before the district court that the government had not presented any evidence that Woods's consent was voluntary; and, therefore, it had not met its burden and the consent must be considered involuntary. Even assuming that the government did not offer evidence of the voluntariness of the consent, Foster does not show that, had the government been put to the test by a party who had actual standing to contest the search, it could not have presented evidence that Woods's consent was voluntary. See Claimant's Reply, Etc. (Doc. No. 50) at Exh. M.

Finally, the government did not offer any evidence pertaining to the stop of Woods's car or the results of the search thereof at trial. Thus, there is no prejudice to Foster, even assuming he could have established his standing and had been successful in excluding evidence of the search.

In his August 6, 2001, pleading Foster complains that the government withheld documents and then divulged their existence immediately before jury deliberation. According to the trial transcript, the Assistant United States Attorney notified defendant and the trial court that he had just discovered some evidence obtained from boxes of documents seized from Foster's residence that included "a bill of sale from N. Edward Tait of Inglewood, California to Raymond Tohill of Lantern Lane, Lake St. Louis, . . . a notice of release of liability in the name of Raymond Tohill . . .

[i]t's seller's name, Tait . . . and bill of sale from Cadillac dealer." Trial Tr., Vol. 8 at 184-85. Exactly how these documents establish a link between Foster and the brown Cadillac driven by Woods remains unclear. But, even assuming a link sufficient to support standing to challenge the search of the brown Cadillac, Foster still would not have been successful at suppressing any evidence because of Woods's voluntary consent to the search. Additionally, the government did not offer any evidence pertaining to the stop of Woods's car or the results of the search thereof at trial.

Foster also argues prosecutorial misconduct in various respects (grounds 3, 4, 5). First, movant claims improper argument and comments were made by the prosecutor regarding a money counting machine, a box containing cocaine residue, and in connection to the Colombian drug trade. Foster can only surmount the procedural bar, if he can demonstrate that these comments so infected the trial as to deny him due process of law. United States v. McGuire, 45 F.3d 1177, 1189 (8th Cir.), cert. denied, 515 U.S. 1132 (1995) (court looks at whether remarks or conduct by prosecutor were improper, and if so, whether the remarks or conduct prejudicially affected defendant's rights depriving him of a fair trial). In making the determination of prejudicial effect, the court may consider the cumulative effect of the misconduct, the strength of properly admitted evidence of guilt, and curative actions by the trial court. Id. at 1189-90.

Foster fails to meet his burden. Upon review, the undersigned fails to find any argument or comments by the prosecutor that resulted in the denial of the due process of law. The opening statement and the closing arguments were a fair characterization of the evidence presented. Further, the undersigned notes that the jury was instructed that the arguments of counsel were not evidence. Trial Instruction 3. The jurors had the ability to put aside the arguments of counsel and consider the evidence with the assistance of the instruction. The jurors are presumed to have followed the

court's instructions. United States v. Paul, 217 F.3d 989, 997 (8th Cir.), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Jan. 29, 2000) (No. 00-8635).

Foster argues that the prosecutor impermissibly elicited evidence regarding a money counter and box containing cocaine residue when those items were not available for inspection by the defense. "[U]nless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." United States v. Einfeldt, 138 F.3d 373, 377 (8th Cir.), cert. denied, 525 U.S. 851 (1998) (quoting Arizona v. Youngblood, 488 U.S. 51, 58 (1988)). Foster fails to establish any bad faith on the part of the federal government. Indeed, it appears from the trial transcript that the money counter was successfully suppressed in California state court proceedings and destroyed after entry of that state court suppression order. Trial Tr., Vol. 2 at 232, 238-41. Further, Foster does not state how inspection of the counter or box would have assisted his defense or resulted in an acquittal. Movant essentially asks this court to presume some prejudicial effect from the physical absence of this evidence at trial. There is no basis for doing so.

The undersigned rejects Foster's attempts to impute bad faith to the government. There is no evidence that the government destroyed or is withholding his documents in bad faith. Foster also fails to establish that there was exculpatory evidence contained in his documents, or that the money counter and cardboard box constituted exculpatory evidence. The undersigned rejects as conclusory Foster's argument that the mere fact he asked prison authorities to turn over his documents to his attorney made his documents obviously inculpatory to the government. Additionally, Foster fails to establish that the documents could not have been replaced.

Foster also alleges that the prosecutor improperly commented and elicited testimony that the alleged conspiracy reached Colombia. There was no impropriety in this. As the Eighth Circuit determined:

Foster argues Garavito's testimony was more prejudicial than probative because the government used the testimony to enlarge the size of the conspiracy from Columbia [sic] to St. Louis which inflamed the jury. Nothing indicates that Garavito's testimony lured the fact finder into declaring guilt on the fact that the drug conspiracy stretched from Columbia [sic] to St. Louis instead of from California to St. Louis. . . . Garavito was only one of several witnesses presented by the government. The emphasis placed on his testimony and the size of the conspiracy issue, in light of the entire trial, was minimal. There was no unfair prejudicial effect of Garavito's testimony. The trial court has broad discretion in determining whether the probative value of Garavito's testimony outweighed the unfair prejudice. . . . We cannot say the district court abused its discretion in admitting this evidence.

Payne, 119 F.3d at 645 (citations omitted). These findings preclude the determination of prejudice sufficient to surmount the procedural bar by the prosecutor's comments and conduct in eliciting testimony that the conspiracy reached to Colombia.

Foster also alleges that the prosecutor improperly lead the defense to believe that the testimony of Garavito was admissible under Federal Rule of Evidence 404(b), but then argued for its admissibility under Rule 801(d)(2)(E). The trial court considered the admission of the testimony under both rules. Trial Tr., Vol. 1 at 11-13. Trial counsel is presumed competent and Foster bears the burden of demonstrating otherwise. Strickland v. Washington, 466 U.S. 668, 689 (1984).

More specifically, this court must presume that defense counsel knew the various legal theories that could support admission of Garavito's testimony whether or not the prosecutor was leaning to one theory or another. The presumption is that defense counsel knew the rules of evidence bearing upon admission of the testimony, including Rule 801(d)(2)(E), and this is borne out by the record. Defense counsel moved in limine to prohibit use of the taped

conversations between movant and Garavito, because Garavito was not part of the charged conspiracy or a player therein, and the statements were not made in furtherance of the conspiracy. Trial Tr., Vol. 1 at 2-4. To now argue that the prosecutor somehow mislead defense counsel as to the rules of evidence is belied by the record. Ultimately, the trial court found sufficient evidence that a conspiracy existed. See Trial Tr., Vol. 6 at 234-36. The Eighth Circuit was asked to review the admission of the evidence under Rule 403 on direct appeal. The Court of Appeals concluded that the district court properly admitted the evidence. Payne, 119 F.3d at 645. There is no prejudice to movant from admitting the evidence under one rule as opposed to another rule.

In conclusion, grounds 1 through 5 are procedurally barred from review and movant has not shown cause and prejudice to surmount that bar. Additionally, movant failed to demonstrate his actual innocence and that the failure of this court to consider these defaulted claims would result in a complete miscarriage of justice.

Grounds 6-8: Ineffective Assistance of Counsel

In order to succeed on a claim of the ineffective assistance of counsel, movant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 687, 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. In short, movant is only entitled to relief on a claim of ineffective assistance of counsel, if he can demonstrate that counsel's errors were so serious as to deprive him of a "fair trial, a trial whose result is reliable." Id. at 687. There is a strong presumption that counsel rendered effective assistance. Id. at 689. Further, the reasonableness of counsel's performance is judged as of the time rendered, not through hindsight. Id. Strategic choices made by counsel after investigation of the facts and law are

virtually unchallengeable. Id. If the movant fails to make an adequate showing on either of the two prongs, the court may dispose of the claim without examining the other prong. Id. at 697.

In ground 6 Foster alleges that his trial counsel failed to inform him of the purported change in strategy by the prosecutor regarding the admissibility of Garavito's testimony. Even assuming that there was a change in the prosecutor's strategy and defense counsel failed to notify Foster, and that such a failure fell below an objectively reasonable standard, Foster has not demonstrated any resulting prejudice. He does not show that, had counsel so informed him, the result of the proceeding would have been different. Neither movant nor his counsel can control the prosecutor's strategy or his legal bases for arguments. Further, this change in strategy apparently only applied to Garavito's testimony. As the Eighth Circuit found, in the overall scheme of the trial, Garavito was only one of several witnesses and the emphasis placed on his testimony was minimal. Payne, 119 F.3d at 645. Given all of the other evidence against him, the jury would have likely found Foster guilty without Garavito's testimony.

Movant also alleges that trial counsel failed to inform him of a plea offer made by the prosecutor immediately prior to trial which he would have accepted. The prosecutor denies that he made a plea offer. Government's Resp. to Movant's Am. Motion, filed May 1, 2001 (Doc. No. 42) at 13-14. Rather, the record reflects that defense counsel approached the prosecutor about a plea bargain and that the prosecutor "needed to go upstairs to discuss that matter." Apparently those discussions were unfruitful. Trial Tr., Vol. 1 at 1-2, 7. Foster does not describe the terms of any purported plea offer. Any suggestion that his sentence would have been less, had he pled guilty, than that imposed after trial would be entirely speculative. The record refutes Foster's factual claim and he fails to demonstrate any prejudice resulting from this alleged error by counsel.

In ground 7 Foster alleges that appellate counsel was ineffective in failing to challenge the issue of the admissibility of Garavito's testimony under Federal Rule of Evidence 801(d)(2)(E). The record is clear that appellate counsel challenged the admission of the testimony under Rule 403 and the Eighth Circuit ruled on this issue. Foster's claim appears to be that his appellate counsel should have argued the matter under Rule 801(d)(2)(E). This argument is without merit. First, defining and refining the issues on appeal is the hallmark of effective advocacy. Consequently, it is not clear that counsel's choice to proceed with argument under Rule 403, rather than Rule 801(d)(2)(E) or both, fell below an objective standard of reasonableness. However, it is not necessary to resolve the issue of whether appellate counsel was deficient in this respect, because Foster fails to establish actual prejudice.

Foster has failed to establish that, had counsel so argued, the result of the proceeding would have been different. As the Eighth Circuit pointed out, it would only review the district court's evidentiary rulings for an abuse of discretion and would not reverse a conviction on the basis of an erroneous evidentiary ruling where the error is harmless. Payne, 119 F.3d at 645. Even assuming that the admission of the evidence was erroneous and an abuse of discretion (an assumption not supported by the record), the Eighth Circuit would have found the error to be harmless. It determined that the emphasis on Garavito's testimony in light of the entire trial was minimal. Payne, 119 F.3d at 645. There was sufficient evidence for the jury to have convicted Foster, including the testimony of other co-conspirators, even in the absence of Garavito's testimony. See United States v. Mitchell, 31 F.3d 628, 632 (8th Cir. 1994) (erroneous admission of hearsay under Rule 801(d)(2)(E) exception harmless error where there was other sufficient, competent evidence to find guilt beyond a reasonable doubt). Consequently, the undersigned is convinced that, even if appellate counsel had challenged Garavito's testimony under Rule 801(d)(2)(E), the Eighth Circuit still would have affirmed Foster's conviction.

In ground 8 Foster alleges that appellate counsel labored under a conflict of interest because he demanded payment from Foster even though he was appointed under the Criminal Justice Act. Foster was entitled to conflict free counsel at trial and on his first direct appeal and claims of attorney conflict of interest are very serious. See United States v. Lashley, 251 F.3d 706, 711 (8th Cir. 2001) (the Sixth Amendment guarantees a defendant the right to conflict free counsel). But a movant is only entitled to relief if he can show that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his counsel's performance. Strickland v. Washington, 466 U.S. at 692.

Foster's claim of conflict of interest is frivolous. He alleges that he paid counsel upon counsel's demand. See Amended § 2255 Motion, filed January 11, 2001, at 8. Thus, Foster himself removed any purported "conflict of interest." There is no basis for collateral relief on this claim.

Friedman v. United States, 588 F.2d 1010 (5th Cir. 1979), is factually distinguishable. Therein, the attorney allegedly told the movant that payment under the Criminal Justice Act was too meager to justify more than perfunctory effort. Movant therein was only able to satisfy part of the attorney's demand for additional payment. The court did not ipso facto conclude that the attorney had rendered ineffective assistance by reason of his demand, but did find such evidence to result in an increased possibility that the attorney's efforts were perfunctory where there were factual allegations supporting assertions of inadequate preparation, failure to call material witnesses, and attorney indifference. Herein, Foster satisfied appellate counsel's alleged demand. Thus, there is no basis to assume less than effective representation. This, coupled with the fact that Foster has asserted only one ground of ineffective assistance of appellate counsel (ground 7), which the undersigned has already considered and found unavailing, leads to the inescapable conclusion that Foster is not entitled to collateral

relief merely because appellate counsel asked for and received additional payment.

Similarly, in Harris v. Housewright, 697 F.2d 202, 206 (8th Cir 1982), the mere demand for payment by appointed counsel did not result in a determination of the ineffective assistance of counsel. Indeed, the court found that counsel, barely out of law school and faced with a difficult murder trial, did not make any single error of constitutional dimension, but that the cumulative effect of multiple errors resulted in performance below the customary standard of professional competence. Id. Thus, the court concluded that, wholly apart from the demand for payment, the petitioner received ineffective assistance based upon the cumulative effect of errors. The Eighth Circuit has recognized that Housewright was overruled by Strickland. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir.), cert. denied, 519 U.S. 968 (1996). Foster has only claimed one instance of ineffective assistance of appellate counsel which the court has considered and rejected. While a request for payment by appointed counsel may in certain circumstances be considered by the court in determining whether effective representation was rendered, the undersigned concludes that the purported request for payment herein does not entitle Foster to collateral relief, because Foster was able to satisfy the demand and Foster's one claim of ineffective assistance of appellate counsel has been found to be insufficient.

Ground 9: Sentencing Error

Foster claims that the imposition of 300 months imprisonment was contrary to law, because the issue of drug quantity was never submitted to the jury. This claim, under Apprendi v. New Jersey, 530 U.S. 466 (2000), is foreclosed to him on collateral attack. In United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001), the Eighth Circuit held that Apprendi does not apply retroactively to cases on collateral review. Thus, this claim is not cognizable in this action.

Additionally, as in Moss, this claim could have been raised on direct appeal but was not. Moss, 252 F.3d at 1001-03. Thus, as discussed above with respect to grounds 1-5, this claim is procedurally defaulted unless movant can demonstrate cause and prejudice to overcome the bar, or demonstrate his actual innocence. Foster fails to allege any cause and prejudice to overcome the bar. He has also failed to demonstrate his actual innocence as discussed above.

For these reasons,

IT IS HEREBY RECOMMENDED that the original and amended motions of Christopher Foster to vacate, set aside or correct sentence be denied without an evidentiary hearing.

IT IS FURTHER RECOMMENDED that any other pending motions be denied as moot.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to timely file written objections may result in the waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of August, 2001.